No. 13,681

United States Court of Appeals

For the Ninth Circuit

ERNESTINE C. SINISCAL and ELMER A. REED,
Appellants,

vs.

UNITED STATES OF AMERICA, as Trustee and Guardian and ex rel. of the Estates and Persons of Jasper Grant and Harold F. Thornton; HENRY B. TAYLOR and ELIZABETH A. TAYLOR, husband and wife; WILLIAM F. BRENNER and FRED M. MARSH,
Appellees.

UNITED STATES OF AMERICA, as Trustee and Guardian and ex rel. of the Estates and Persons of Jasper Grant and Harold F. Thornton,
Appellant,

vs.

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Appellees.

Appeal from the United States District Court for the District of Oregon.

Honorable Gus J. Solomon, District Judge.

APPELLANTS' BRIEF.

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STATEMENT OF THE CASE.

This is an appeal in a civil suit and is a conglomeration of almost everything in the book, and naturally the record is very voluminous, mixed and complicated,

which is the result of a dozen or more attorneys participating in the trial and representing a variety of defendants with a variety of issues. The Court made findings and conclusions and a decree that appellants Siniscal, Reed and Taylors had committed fraud in the sale of the land, and all documents executed for the sale of the land were held null and void, including the escrow agreement, and made directions as to the sale of the property by the Indian Bureau. The appellants Siniscal and Reed filed their appeal, then the United States of America as guardian and ward and trustee filed their cross-appeal, which does not concern these appellants Reed and Siniscal. The other defendants did not appeal. The appeal is from a decree against appellants and the Taylors.

STATEMENT OF FACTS.

The appellees claim that appellants and the Taylors conspired together to and did defraud these allottee Indians, Grant and Thornton, out of certain inherited interests of land and timber in Curry County, Oregon, apparently 750 acres of rough and stony land and unsuitable for agricultural purposes.

The appellants and the Taylors are the only ones found guilty of conspiracy to defraud by the Court, in finding and decreeing that the appellants and the Taylors were guilty of conspiracy and fraud in that the price of the land sold to the Taylors was of greater value than the appraisal of $135,000.

The appellees have cross-appealed against the Taylors, but appellants have no interest in that appeal.

These appellants made various efforts by motions to require appellees to make their complaint more definite and certain by setting forth more clearly the specific acts of conspiracy and fraud which these defendants were charged with in the complaint, but their efforts were denied.

The appellants unsuccessfully moved for dismissal of the complaint on the ground that no conspiracy or fraud had been charged or established. The Court also denied the motion to amend the amended findings.

In about the middle of May, 1951, a Mr. Alexander, mill operator who lives at Gold Beach, Oregon, near to this land in question, inquired of appellant Elmer A. Reed, a Siletz Indian living on the reservation, if he knew if this Indian land was for sale, and if it could be purchased, and Reed answered that he did not know, but they could inquire at the Indian Bureau, Portland, concerning it.

That thereafter appellant Reed and Alexander visited the Indian Bureau and were advised that it required the consent of the Indian owners and the appraisal of the land and timber.

That later Reed and Alexander were advised by the Indian Bureau that the timber and said land had been appraised at $135,000, and the consent of the Indians to sell was thereafter secured.

That Alexander wanted to buy the timber and land, and he entered into a contract with Reed whereby Reed was to purchase the land from the Indian sellers and sell it to Alexander for the appraised value of $135,000. That thereafter the Indian Bureau learned about this Alexander-Reed contract, and upon further investigation, found that Alexander was having difficulty raising the money, and the Bureau refused to proceed with the sale, and declared it closed, and Alexander and Reed were so advised. That Alexander thereafter started a public exposure through letters and newspaper articles to the effect that he was the one who was entitled to be the purchaser of said timber and land, in order to stop the sale to the Taylors. Alexander in this case was granted leave to intervene by order of this Court, and under the decree herein, the intervenor's case was dismissed.

In the latter part of July, 1951, a man by the name of Blanford, unknown to appellants, called upon appellant Reed, requesting him to purchase the land from the Indian owners and then sell it to a purchaser he might find, but Reed advised him that he had a contract with one Alexander, and the Indian Bureau had turned him down; however, he might see his daughter, Mrs. Siniscal, in Portland, Oregon, who was of the same Indian tribe, and she might purchase the property.

Thereafter in the latter part of July, 1951, said Blanford called upon appellant Siniscal and told her the appraised value of the timber and land was

$135,000, and if she would purchase it, and if he found a buyer, he would pay her $25,000 as a fee for her services. That about the 5th day of August, 1951, Blanford called appellant by phone and told her he had a buyer for this Indian land, and for her to appear at the Indian Bureau, Portland, on the morning of August 6, 1951, which she did, accompanied by her father, appellant Reed, as she was in a delicate condition, but she was told by Blanford that morning at the Indian Bureau that the parties buying this Indian land lived at The Dalles, Oregon, but they could not get there until tomorrow, and for her to return tomorrow morning to the Indian Bureau.

That in the forenoon of August 7, 1951, is the first time appellant Siniscal ever met the supposed prospective purchasers who were the Taylors, and Brenner, and Marsh. That Siniscal and her attorney and Mr. Taylor went to the Indian Bureau office, and there, at the request of La France, secretary of the Indian Bureau, Siniscal signed the final papers to complete the sale, the application for removal of restrictions on said land, and she was handed the order of removal of restrictions by the secretary, etc. The money was paid the Indian Bureau by Mr. Taylor by a bank draft for $135,000 in the presence of Siniscal and her attorney. Appellant Reed was not present.

After the completion of the sale appellants later in the day went to the office of Mr. Wilber Henderson, attorney for the Taylors, and thereupon an escrow agreement was executed between appellant Siniscal

and Mrs. Taylor for the $25,000 she was to receive from the Taylors as her fee for her services.

At the conclusion of the trial, the Court found that the appellants Siniscal and Reed and the Taylors had conspired to defraud and did thereby defraud appellees in that the timber was of the value of $300,000 instead of $135,000 as appraised by the Indian Bureau on May 16, 1951, and this is the principal basis from which this case arose. The Court finally absolved all the Indian Bureau officials of any and all fraud and liability in this land transaction, notwithstanding they were sitting in authority and directed what procedures were legal and proper. The appellant Siniscal had but little, if any, personal knowledge or information of her own and wholly depended and relied upon the information and directions received from the Bureau officials; in fact, she had no other choice. Furthermore, the officials of the Bureau prepared all documents in connection therewith and directed the appellant Siniscal to sign them which she did, and the sale was completed and the Bureau received the money. All of which did not require over ten minutes of time.

About the time this case was filed, Flinn, in charge of the Land Department, and La France were suspended from the Bureau. For what reasons, the appellants have no information or knowledge.

SPECIFICATIONS OF ERROR.

I.

The appellants Siniscal and Reed are enrolled Siletz Indians, and the relationship of guardian and ward exists with the United States of America. Can the United States of America be a plaintiff in a suit against the appellants while the relation of guardian and ward exists by both parties? Did the Government err by representing both parties as guardian and ward in this case at the same time?

II.

The Court erred in holding that appellant Siniscal merely was an agent and conduit by and through which Taylors acquired these lands and not an Indian pursuant to Section 241.11, Code of Federal Regulations, while the whole transaction was handled by the Indian Bureau as disclosed by the transcript of record.

III.

The Court erred in holding that the order signed by E. Morgan Pryse on August 7, 1951, transferring allottees' inherited trust lands to Siniscal was an ultra vires act, after the Bureau had supervised the whole transaction? Are the officials of the Bureau not estopped from denying their acts and conduct?

IV.

The Court erred in decreeing that the execution of the documents between appellant Siniscal and the

Taylors for the sale of said land, prior to the issuance of the fee patent, was null and void.

V.

The Court erred in decreeing that $135,000 paid for the land was grossly inadequate, after the United States of America had fixed the price of the timber land on May 16, 1951 and had offered it for sale to the public, for three months prior to this sale, at the appraised value of $135,000. If that was not the market value of the timber and land, how can the Court now claim that it all was the appellants' conspiracy to defraud which brought about this $135,000 appraisal?

VI.

The Court erred in decreeing the appellants were guilty of fraud and deceit in the sale of the land, after the United States of America had negotiated and made the sale from beginning to end, and appellant Siniscal only did what she was requested to do by the Indian Bureau which resulted in the Indian Bureau receiving the $135,000 for the appraised value of said land, which completed the transaction, as nothing further remained to be done, except the fee patent which was issued September 26, 1951.

VII.

The Court erred in finding and decreeing that appellant's conspiracy to defraud was the reasons for setting aside the sale, when as disclosed by the record,

the appraisal of the timber and land by the Indian Bureau at $135,000 was the real ground and basis of this whole case, and the appellant Siniscal was made the tool whereby this alleged conspiracy and fraud was perpetrated.

VIII.

The Court erred in setting aside the escrow agreement and the other documents therewith, and declaring them null and void, in view of the fact that the escrow agreement was made by the parties after the sale of the land had been fully completed. The consideration for the escrow was a separate deal and had nothing to do with the consideration for the land. It was a definite fee agreed upon between the parties for services rendered. The appellees had no interest therein whatsoever, and the Court had no jurisdiction over the parties or the subject matter. The title had vested in the Taylors when the fee patent had been issued by the Secretary of Interior, on September 26, 1951, and forwarded thereupon to the local Land Department of the Indian Bureau, and that terminated appellees' interest as allottees.

IX.

The Court erred in decreeing that the lands in question be resold by the Indian Bureau to the highest bidder, etc., which order was in direct violation of the United States statute prohibiting sales by the Court of allotted land owned by these appellants. (Al-

lotment Act, February 8, 1887 (24 Statutes 389, as amended February 28, 1891).)

X.

The Court erred in finding appellants had committed fraud when appellants had no knowledge or information as to what representations or transactions all the other defendants had with the Indian Bureau, it was the Indian Bureau's duty to advise Siniscal correctly as to the procedure required for the sale. Appellants had no knowledge nor participated in anywise in the preparation or negotiation of the sale except her financial statement and only signed the documents the Indian Bureau requested of Siniscal.

XI.

The Court erred in charging Siniscal and Reed with fraud in her application for removal of restrictions after they had performed all the requirements requested by the Indian Bureau. The financial statement in the application to remove restrictions, which was only an administrative local form, was made and used only for the sole purpose to advise the Bureau of her ability to handle the property after she agreed to purchase it. The Indian Bureau was not interested as to where Siniscal would get the $135,000 to pay the price of the land. What difference does it make where or how Siniscal got the money, as long as the Bureau got the $135,000 it demanded as the price for the timber and land.

XII.

The Court erred in not decreeing that in as much as the land had been sold by the Indian Bureau, with the consent of the appellees, and the $135,000 had been paid to them, that they were fully satisfied. The appellees has spent a considerable portion of it and had a guardianship appointed over them in the State Court. Some of the timber had been cut down on the land, and expenses incurred thereon. The Indian appellees were paid monthly allowances even after this case had been filed. The Indian Bureau had deducted 10% for its services, and other steps were taken to dispose of the matter. The patent was issued to Siniscal on September 26, 1951 for this land by the Secretary of the Interior. That in good conscience and equity the suit should have been dismissed by the Court, and these allottees be permitted to enjoy the benefits therefrom in their old days. They wanted a home to live in during their old days, as they never had one.

THE ISSUES.

I.

Was it not error for the Court to make findings and conclusions and decree that the appellants had committed fraud in preparing and executing the applictaion to remove restrictions and especially so after the undisputed evidence disclosed that appellant Siniscal could have secured a loan for $135,000

from any bank on the coast? Furthermore, the appellant had been advised that the prospective purchaser of the land would pay the price in full of $135,000 to Sinsical, which saved Siniscal a lot of extra expense and time, and no one was injured. The Bureau Officials accepted the money and thereafter gave a personal receipt therefor to Siniscal accordingly. The Indian Bureau officials were not interested or concerned how or from whom or where Sinsical got the $135,000 to pay them the price of the land. All it wanted was that amount of money, $135,000, and no one was harmed.

II.

Was it not error for the Court to make findings and conclusions that the appellant Sinsical had committed fraud in signing the application to remove restrictions, when the evidence disclosed that in fact, it was the method and procedure that appellant Siniscal was advised to follow, and she depended wholly upon the Indian Bureau officials as to the method and procedure required? If anything was wrong in the procedure in the handling of this transaction, it was the officials' absolute duty to so advise Siniscal and the Taylors, right then and there. Furthermore, this method and procedure had been followed all these years by the Indian Bureau without complaint.

III.

Did the Court err in making findings and conclusions that appellants and the Taylors had committed

conspiracy to defraud, when no one was injured or damaged as a result of the sale of the land, and when the Indian Bureau had fixed the price of the timber and land at $135,000, and on the 7th of August, 1951 appellants paid that amount to the Bureau for the use and benefit of said appellees, and it was so accepted? Why is appellant Reed made a party defendant and now an appellant when he had nothing to do with this sale or transaction? The fact is that his daughter was in a delicate condition and required an attendant, and the father was the proper person.

IV.

Was the Court in error when it made findings and conclusions that the appellant Siniscal had committed fraud in the sale of said land to the Taylors, as a mere agent for hire, instead of purchasing the land for herself, and she was therefore not an Indian for her own account? The Indian Bureau had full information and knowledge, and no one of the officials in any way questioned the procedure followed. Everything was all right until Alexander blasted his horn, shouting fraud, when he did not get the timber, and he is the one who started the fireworks, but he himself was to blame for his loss.

V.

Did the Court err in making findings and conclusions exonerating Area Director Morgan Pryse and other officials of the area of the fact that they were unaware of the true value of the property involved

herein, and the procedure and method followed, etc. in the sale? The Area Director testified that the Bureau had been following the wrong procedure in this as well as in former and later sales of Indian land, and that the Court should give them the correct opinion on it, as to how to handle these sales (Vol. I, p. 345, Tr. of Rec.), when it was the duty of said officials to strictly observe and comply with all laws, rules and regulations thereunder, which were unknown to appellants and the Taylors, and furthermore the Bureau had special counsel right at the Indian Bureau, with whom they could consult.

VI.

Was the Court in error in making findings and conclusions of law that the escrow agreement between Taylor and appellant Siniscal, for the payment of her services in the sale of this land be set aside and is null and void, notwithstanding, the escrow was a separate and distinct agreement between separate and distinct parties and for a new and different consideration, and constituted no part of the sale of the land, and was made 3 or 4 hours after the sale had been fully completed at the Indian Bureau. The patent to the land had been issued September 26, 1951, to Sinsical. The government had the sole power to extinguish titles to Indian allotted lands.

VII.

Was the Court in error in decreeing that this Indian land be resold by the Indian Bureau to the

highest bidder, in view of the law prohibiting sales by any Court of allotted lands?

ARGUMENT.

I.

CAN THE GOVERNMENT MAINTAIN THIS SUIT WHEN THE RELATIONSHIP OF GUARDIAN AND WARD EXISTS BY BOTH PARTIES?

The relation of guardian and ward is so mixed up among the numerous Indian tribes by statutes, regulations and Court decisions, that it is next to impossible to segregate them from among the numerous other tribes. If one finds the words guardian and ward, incompetent etc. in the Indian law, it is impossible to apply it to any particular tribe or situation, as many tribes have special laws, evidently enacted to fit the situation. It is the universal law that a person who has a guardian, is either a minor or is incompetent in some form, that prevents him being competent mentally, a minor, or otherwise. There can be no question that the appellants are incompetents, and likewise the relation of guardian and ward exists between appellees and the government in so far as the land is concerned. How did the Court acquire jurisdiction over the appellants in this case?

II.

WAS SINISCAL AN INDIAN OR A CONDUIT FOR THE TAYLORS IN THIS SALE?

Did the Court err in finding that appellant Siniscal was not an Indian when she signed the documents whereby she acquired the title to the land and thereafter conveyed it to the Taylors? The government and not the Court has the right to declare when Siniscal's guardianship ends. The Indian Bureau officials prepared the documents and had Siniscal sign them as an Indian. After she acquired the title to this land and conveyed to the Taylors, she still was an Indian. I do not know under what law or authority the Court acted in declaring Siniscal a non-Indian when she is an enrolled Indian upon the records of the Siletz Indian Reservation, and the Court had no right or authority to suspend her temporarily as a non-Indian. There can be no question but that Siniscal was an Indian under Sec. 241.11, Code of Federal Regulations when she signed all those documents at the request of the Indian Bureau officials. Granting the Courts finding that she was a non-Indian on the ground that she had committed fraud, which we deny, it still did not give the Court authority to find her to be a non-Indian under these circumstances.

III.

WAS THE ORDER SIGNED BY PRYSE TRANSFERRING INHERITED INTEREST LAND TO TAYLORS AN ULTRA VIRES ACT?

An ultra vires act is generally defined as an act performed beyond the powers authorized. We presume that the Court meant that Siniscal acted beyond the scope of her authority. She still was an Indian under guardianship when she made the conveyance to the Taylors. The Indian Bureau advised her when she acquired the title to the land, she could sell to anyone she pleased, and that was the law and the procedure they pursued at the Indian Bureau. If the Indian Bureau was wrong in giving Siniscal this advice, why should her acts be held to be ultra vires? No one can claim that there was any willful violation on her part. In any event, we do not consider her act in that respect as an ultra vires act. There certainly was no fraud connected with it.

IV.

WAS THE SALE BETWEEN SINISCAL AND TAYLORS NULL AND VOID ON THE GROUND THAT IT WAS PRIOR TO THE FEE PATENT?

The Court was in error when it declared and held the contract between Siniscal and Taylor void. Siniscal never had met the Taylors before they arrived at the Indian Bureau office on August 7, 1951. How could Siniscal apply for a fee patent before she had an order removing restrictions. For answer to this situation we say that the title vested when the Indian

Bureau transferred to her on August 7, 1951, the inherited interest of the appellees, and then she had a right to sell the land. All this was testified to by both Pryse and La France repeatedly in their testimony, which extends throughout their whole testimony, and Pryse referred to the Act of August 8, 1946 (60 Fed. Stat. 939). Exhibit 4 is the order removing restrictions and Exhibit 5 is the transfer of inherited interests. It would necessitate a greater portion of the testimony of Pryse and La France to correctly advise the Court, but it is too long, and we ask the Court to read the whole of it.

Inasmuch as some of the specifications of error are so interlocked in the testimony it becomes necessary to join them together to avoid repetitions.

V and VI.

THE APPRAISAL.

WAS IT ERROR FOR THE COURT TO REEVALUATE THE TIMBER?

The first act in this case was the appraisal of the timber and land by Mr. Gray, (and his testimony beginning on page 516 to 532 transcript of record; Exhibit 13 is the appraisal) who was an employee of the Forestry Division of Bureau of Indian Affairs at Swan Island area, and had been such employee for 34 years. Appraisals were a part of his duties. This appraisal is entitled to high credit as an act of an official of the Indian area. His testimony is frank and

open and recites his appraisal in detail. The cruise showed approximately somewhere over 19 million feet, and he raised this amount from the former cruise of 1925 to approximately 24 million feet which is pretty close to the figures of 26 million feet found by the special government appraiser on 800 acres. There always is a presumption that an official duty has been honestly and regularly performed. This appraisal is the real crux in this case, from the very beginning to the last drop. The appraisal was made on May 16, 1951 at the request of Mr. La France as secretary of Indian affairs after Alexander inquired what the appraisal of the timber and land was.

This appraisal was made the outstanding issue throughout the trial. The allottees Grant and Thornton were satisfied with the appraisement of Gray, and they wanted their money; so they could secure a home to live in after they had been trying for 30 years to sell it. (Volume III near the top of page 556, transcript of record.)

There was a conflict between the witnesses as to the value of the timber and the market price.

Inadequacy of consideration is not significant in suits over Indian lands.

27 *Am. Jur.* 562-565, Secs. 34-35;

Klamath and M. Tribes v. U. S., 80 L.Ed. 202, 296 U.S. 244;

Thory Wire Hedge Co. v. Washburn Co., 40 L.Ed. 205, 159 U.S. 423-443;

Wheeler v. Smith, 13 L.Ed. 44-45.

The presumption is at all times in favor of the appellants, that there was no conspiracy to defraud these men in the sale of their land, and the government has the burden of proof to overcome this presumption. The Indian Bureau had full and complete charge of the appraisal when it was made on May 16, 1951. Neither of the appellants were at that time interested in the purchase of this land or knew anything about it. The appellants have never seen the land and timber at any time. All information Reed had was later obtained through the Indian Bureau and Alexander. The appellant Reed certainly cannot be held guilty of conspiracy of fraud in the sale of this land, after Alexander was turned down in the middle of July 1951 from becoming a purchaser of the land, and then Reed had no further interest in the matter. Thereafter Blanford, a stranger to Reed, called upon Reed to become a buyer for the land and then sell it to a purchaser Blanford might find, which Reed refused to do on account he had been turned down on the Alexander matter, but suggested he could see his daughter, appellant Siniscal, who was of the same tribe as these Indians, Grant and Thornton. Blanford also was a stranger to Siniscal, and when he offered her $25,000 for her services, in case he would find a buyer, she consented to act (p. 787 Vol. III, Tr. of Rec.), and he told her it had been all arranged at the Swan Island office so he could get the land for his buyer. The rule is in absence of fraud or bad faith, the appraisal is conclusive.

Polley's Lumber Co. v. U. S., 115 Fed. (2d) 751 (9th Cir.);

U. S. v. Harris, 100 Fed. (2d) 268 (9th Cir.);
U. S. v. Gleason, 175 U.S. 588.

Application for removal of restrictions.

Counsel for appellees made considerable out of what they claim to be "Falsehoods in this application". No specific falsehood is pointed out. It may be that her values are somewhat over-stated. However, if the application was for the purpose of determining whether or not the applicant had sufficient money to buy the property in question, it is obvious that she did not, and no one was deceived in that respect. She shows a total income of $20,000.00, gross, and then she states she owns a one-half interest in a seafood and grocery market.

Under the third subsection, which is a statement of assets and investments, she shows a one-half interest in the business of $4,000, an automobile, machinery and household goods, aggregating $9,500.00 and town property valued at $17,000.00. It is patent that she did not have the $135,000.00 necessary to pay for the property. There is no statement made in the application, material to the determination, as to whether or not Ernestine C. Siniscal was eligible to buy the property in question, that is not true; furthermore, it was only a local administrative form for the use of the Bureau. If she had gone to a bank to secure a loan and presented a financial statement, which was false, then she would become liable; however, this is a wholly different situation, in this respect, that this application for removal of restrictions required a

financial statement, which was for the sole and only purpose of informing the Indian Bureau as to whether or not Siniscal was capable of handling the property after she took it over. The testimony of La France and Pryse is too lengthy to be quoted on these points.

As we said before, if the purpose of the application was to determine whether or not she had the $135,000 with which to purchase the property, she made no falsehood in that respect. The purpose, however, of the application was to show only her business competency to handle the property after she got the title. No material misstatement was made in that regard. This fact was clearly evidenced by La France and Pryse repeatedly in their testimony, that they were not interested where or how Siniscal obtained the $135,000. It was self-evident that if she did not have the money, there could be no sale. What difference does it make as long as the government received the $135,000 for the timber and land, which was the government's appraisal value. There certainly could be no claim of fraud by appellees.

The provision for the sale of allotments of incompetent Indians under such rules and regulations, as the Secretary of the Interior may prescribe, are set forth in the Act of March 1, 1907 (34 Stat. 1018; 25 U.S.C.A. 405), and evidently under this law, this sale was consummated. The government held the fee patent on this land and proper application was made by Siniscal for a fee patent, and on September 26, 1951 the

Secretary of the Interior granted her a fee patent to this land. The Indian Bureau evidently had been advising prospective purchasers that no fee patent was required. In fact, as disclosed by the testimony of Reed he purchased a tract of Indian allotment land in October 1951 and was advised that no fee patent was required after the removal of restrictions, and he sold the land immediately to a Mr. Miller who proceeded to log it off. (Vol. III, Tr. of Rec. p. 968.)

VII and VIII.

TRANSFERRING INHERITED INTERESTS.

Was it error by the Court to cancel all documents including restrictions and escrow?

The order transferring inherited interests should, inter alia, read as follows:

> "is hereby transferred to the United States in trust for the.....for use and disposition as other tribal land within said Indian Reservation." Ex. 22.

It is manifest that this was not the correct form, for the reason that the land in question was not within an Indian Reservation. Why should they use a form that would recite that the land was "for the use and disposition as other tribal land within said Indian Reservation", when, as a matter of fact, the land was not within an Indian Reservation, and it was in no sense tribal land. Mr. La France said that the form contain-

ing the above excerpt, which is in evidence as Exhibit 22, was not applicable because that particular form was for use for lands that fell within the Reorganization Act. The form that was actually used (Exh. 5) contains the following:

> "NOW THEREFORE, by virtue of the authority conferred upon the Area Director by the statutes hereinabove referred to, and other applicable provisions of law and by Departmental and Indian Office orders, I hereby declare that all right, title, interest, claim or demand of any nature whatsoever of the heirs of the above-named Eliza Grant, Chancy Grant, Clara Grant, Captain Jack, and Sandy Grant, all deceased, Public Domain allottees No. R-80, 82, 83, 84 and 103 respectively, in and to the
>
> (Property Described)
>
> is hereby transferred to Ernestine C. Siniscal, an enrolled member of the Confederate Tribes of Siletz Indians, subject to the express condition that these lands shall not be alienated, sold, or encumbered without the consent of the Secretary of the Interior."

This shows that the only thing transferred was the right, title, interest, claim and demand of the original allottees in the land in question, and that the transfer was "subject to the express condition that these lands shall not be alienated, sold, or encumbered without the consent of the Secretary of the Interior". This restriction, for such it amounts to, retained in the Government all of the substance of the restriction of the original trust patents. Ernestine C. Siniscal could not

make any disposition of the land, that is, by way of alienating, selling or encumbering, without the consent of the Secretary of the Interior. Appellees look to form rather than substance, and there has never come under our observation a more pronounced deference to form over substance than in this instance.

It is the height of absurdity to attempt to impeach this transaction on the basis of a particular form not having been used. As we said before, the key to the whole situation was with the Secretary of the Interior. With the Secretary of the Interior rested the rights of Ernestine C. Siniscal to alienate, sell or encumber the land.

The testimony of E. Morgan Pryse on pages 344 to 351 inc. Vol. I. Tr. of Rec. clearly shows the manner the Indian Bureau operated under in removal of restrictions in this land sale as well as others. When Siniscal executed the document removing restrictions on this land, she believed and did what she was told by the Area Officials that she could sell the land to anyone she chose, as the title was vested in her, and Siniscal was so advised by the Area officials, and she believed and relied upon it as being true and correct.

The fee patent.

The Secretary of the Interior issued a fee patent to Siniscal for this land on September 26, 1951.

The Circuit Court, E. D. Washington, S. Division held in

Le Clair v. U. S., 184 Fed. 128,

"That the presumption of a fee patent can only be set aside upon the most clear and convincing proof, is the established doctrine of the Supreme Court."

The deed conveying this land from Siniscal to the Taylors was executed August 10, 1951. An application for a fee patent was filed by Siniscal with the Secretary of the Interior, and he issued a fee patent to Siniscal on September 26, 1951 and delivered it to the Land Office Department of the Indian Bureau, Portland, and there it was held up on account of the claim made by Alexander that he should have been permitted to purchase the land instead of the Taylors.

In

Davis v. Robedeaux et al., 222 Pacific 990 (Oklahoma, Jan. 22, 1924),

the Court says:

(1) "It was a question in the trial of the case as to whether or not title passed to the land after issuance of patent and before delivery of same to allottee, and the defendant contended that title passed to the allottee upon issuance of the patent, and the restrictions on alienation being removed, the allottee could sell and convey title to the same before the patent was delivered to him and urges this proposition in his brief, citing:

United States v. Schurz, 102 U. S. 378, 26 L. Ed. 167

Marbury v. Madison, 1 Cranch 137, 2 L. Ed. 60

Monson v. Simonson, 231 U. S. 341, 34 Sup. Ct. 71, 58 L. Ed. 260; and Act of 1887 (U. S. Comp. St. §4195 et seq.)

authorizing allotments of land in cases such as the one under consideration. The plaintiffs, in their brief conceded the point, and we give it our approval without discussion".

In accordance with the authorities above cited, the Siniscal fee patent executed on September 26, 1951 made the deed from Siniscal to the Taylors effective on August 10, 1951.

The escrow.

The Taylors were the depositors of the $25,000 check in escrow with the U. S. National Bank, Portland. However, through their attorneys they were to exercise full control over the money as to its delivery, by reason of which the depositor bank never came into full control of the escrow, and said escrow is void.

10 *R.C.L.* page 626, Par. 8 and Decisions;
Van Valkenburg v. Allen, 126 N. W. 1092;
Prutsman v. Baker, 11 Am. Rep. 592;
Campbell v. Thomas, 24 Am. Rep. 427;
19 *Am. Jur.* 425, Sec. 9 and Citations.

The Court had no jurisdiction over the parties or the subject matter of this escrow, for the reason that it was a separate and distinct agreement and not connected with this suit, and there is a new consideration for the escrow.

After the sale had been completed at the Indian Bureau in the forenoon of August 7, 1951, the parties returned to Portland. Later in the afternoon, Siniscal and her attorney went to the office of Mr. Henderson

where the escrow agreement Ex. 2 (a) was executed by the parties.

It will be observed that the escrow, Ex. 2 (b) p. 433 of Tr. of Record, provides that the check for $25,000 is payable to Siniscal, and that the bank is authorized to deliver the money upon receipt from the firm of Platt, Henderson, Cram and Dickinson, attorneys, advice that they have rendered an opinion that a merchantable title is vested in Mr. and Mrs. Taylor of the said real estate. That the escrow is to terminate at 5 o'clock P. M. August 14, 1951, unless the bank receives a letter from said Platt, Henderson, Cram and Dickinson, attorneys, that there is an objection to the title of said real estate, which is to be corrected.

There was in law no escrow for the reason that the depository never had full control over it, as the Taylors had their attorneys, who also were their agents, keep control of the money for them, which made the escrow void.

The deed of conveyance to this real estate had been theretofore delivered to the grantees, the Taylors, and this escrow was to pay Siniscal for her services in the transaction by which the Taylors secured the title to this property.

At the time this escrow was executed, there was the practice and belief by the Indian Bureau, that title to the land vested in grantees upon the "Removal of Restrictions", and that procedure had been followed for a long time prior to and subsequent to the date of this escrow by the Indian Bureau.

See testimony of Pryse and La France.

However, the Taylors, as soon as they received said deed on August 10, 1951, from Siniscal, had her promptly make through their attorneys an application to the Secretary of the Interior, for a fee patent to this land, and Siniscal did secure her fee patent on said land on September 26, 1951. Thereafter in March 1952 when this suit was filed, the Taylors were cutting timber on said land, but they refused to allow the U. S. National Bank, as the escrow depository, to pay said check of $25,000 to Siniscal, and it still lies there in the bank. Siniscal has in all respects fulfilled her obligations to the Taylors.

The escrow does not contain a sufficient statement of the relationship of the parties thereto nor as to the object and purpose of the escrow.

IX.

DID THE COURT ERR BY ORDERING THAT THE TIMBER AND LAND BE RESOLD BY THE INDIAN BUREAU?

Court order to sell land.

The Court decreed on page 66, Volume I, paragraph 8, that the land and timber involved in this suit be sold by the Bureau of Indian Affairs to the highest bidder, etc. We claim that the Court had no jurisdiction to order the timber and land to be sold. The allotment Act of February 8, 1887, 24 Stat. 388, 25 U.S.C. 372, and amended in 1891, provides that allotted Indian land shall not be sold by decree of any Court. The only thing the Court could do was to

return the land to the appellees, the original owners, and it is up to them to say if they desire to sell it.

X and XI.

DID THE COURT ERR IN HOLDING THAT APPELLEES WERE GUILTY OF FRAUD AND DECEIT IN THE SALE OF THE LAND?

Were the appellants guilty of conspiracy and fraud in any particular in this whole transaction, taking into consideration that they had to and did in fact rely wholly upon the information and advice of the officials of the Indian Area in this whole transaction?

As to the law.

It is a well settled and recognized rule of law that in order to prove and establish conspiracy and fraud, it must be based upon the well known and recognized preponderance of the evidence of the five points. The Supreme Court of Oregon, in *Castleman v. Stryker et al.,* 107 Oregon 48, at page 60 quoted from *"Kerr on Fraud and Mistake":*

> "The Law in no case presumes fraud. The presumption is always in favor of innocence and not of guilt. In no doubtful matter does the court lean to the conclusion of fraud. Fraud is not to be assumed on doubtful evidence. The facts constituting the fraud must be clearly and conclusively established. Circumstances or mere suspicion will not warrant the conclusion of fraud. The proof must be such as to create belief and not merely suspicion. If the case made out is con-

> sistent with fair dealing and honesty, the charge of fraud fails."

and the same Court, in *Miller et ux. v. Protrka et ux.*, 193 Oregon 587, cited the above case on page 592 and others, in support of this decision.

The law never presumes fraud. It is never assumed on doubtful evidence.

The Rules of Civil Procedure, District Court, Rule 9(6):

> "The Averments of Fraud. The circumstances constituting fraud or mistake shall be stated with particularity. To rescind a sale for fraud, the fraud must be established by a preponderance of the evidence, and evidence must be clear, cogent and convincing, positive and satisfactory."

The appellants repeatedly asked the Court to point out any conspiracy to defraud appellees in the record. It seems to us under the evidence that there is no proof to support such a finding that these appellants or either of them knew or ever met any of the parties interested in the sale of this Indian land before the sale. There is no proof that either of appellants knew or were aware of anything illegal whatsoever. Siniscal was merely made a tool whereby this sale was consummated. What interest did appellant Reed have to do with this matter to charge him with being guilty of conspiracy and fraud?

The appellees are trying to evade the real issue in this case, in this, that they endeavor to have the Court believe that these appellants were the real parties who

had conspired together to defraud these appellees, when in fact appellants never heard of the Taylors until they appeared at the Indian Bureau to close the deal for this land. Nor did they see or know Brenner, Marsh or Flinn, except Reed met Flinn at the time Alexander and Reed saw Blanford for a few minutes at Newport, when he wanted Reed to act for his buyer that he might find in the latter part of July, 1951.

Fraud and deceit on application to remove restrictions.

This subject has already been covered heretofore in this brief. The testimony of Pryse and La France will cover this point. The sole purpose of this application to remove restrictions was for the information of the Indian Bureau, in order to find out as to whether Siniscal had the ability and competency to handle this land and timber after she acquired title. The form used was a local one for its own use, and not anything the Government required. The testimony of Pryse and La France fully corroborates this fact which it is also apparent from their testimony that they were of the opinion that they had followed the law in the past and since this sale, as to the procedure and methods in the sale of Indian allotted lands and they inquired of the Court if they were in the wrong, for the Court to advise them.

XII.

DID THE COURT ERR IN NOT DISMISSING THIS SUIT?

The Court erred in not decreeing that inasmuch as the land had been sold by the Indian Bureau, with the consent of the appellees, and the $135,000 had been paid to them, that they were fully satisfied. The appellees had spent a considerable portion of it and had a guardianship appointed over them in the state Court. Some of the timber had been cut down on the land, and expenses incurred thereon. The Indian appellees were paid monthly allowances even after this case had been filed. The Indian Bureau had deduced 10% for its services, and other steps were taken to dispose of the matter. The patent was issued to Siniscal on September 26, 1951, for this land by the Secretary of the Interior. That in good conscience and equity the suit should have been dismissed by the Court, and these allottees be permitted to enjoy the benefits therefrom in their old days. They wanted a home to live in during their old days, as they never had one.

CONCLUSION.

It is just about impossible to write an orderly brief and argument in this case. The whole transcript of record is a mess of entanglements. The issue of fraud, for instance, is continually mixed into every issue throughout the entire transcript of record. The same is true with the issue of the appraisal and likewise

the procedure and the methods of the Indian Area in the sale of allotted lands. No wonder Secretary of the Interior McKay made the public statement, in substance, "that the whole Indian Affairs needs a housecleaning, and the Indians should be set free from all entanglements which now surround them and prevent them from becoming free American citizens to which they were as a matter of right entitled to long ago."

Family units in the ownership of Indian property have always been encouraged by the Government.

A liberal construction of Indian laws in the interests of a weak and defenseless people is the interest and purpose of the Government.

14 *R.C.L.* 136, Section 32;

Red Bird v. U. S., 51 L. Ed. 96, and other citations under Point 14.

Dated, Portland, Oregon,
July 8, 1953.

Respectfully submitted,
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